

IN THE HIGH COURT OF JUDICATURE AT PATNA

Second Appeal No.22 of 1995

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1. Md. Quamrul Haque
 2. Md. Rezaul Haque
 3. Md. Zeyaul Haque, all sons of Late Md. Samsul Haque
 4. Afsana Khatoon W/o Ghulam Quamruddin, D/o Late Md. Samsul Haque
 5. Razda Khatoon W/o Azharul Haque, D/o Late Md. Samsul Haque
 6. Mahjabin Khatoon W/o Wasimul Haque
 7. Wasima Khatoon W/o Md. Kalamuddin, D/o Late Md. Samsul Haque
 8. Asfahani Khatoon W/o Shakir Raza, D/o Late Md. Samsul Haque

All residents of village Hamidpur, Kurji PS Digha District Patna

.... Appellants

Versus

1. Md. Badruddin S/o Late Abdus Shakoor, resident of village Hamidpur Kurji PS Digha District Patna
2. Nirmal Kumar Yadav S/o Late Dakhan Rai
3. Monisul Fatima W/o Hasnain Siddiqui D/o Late Abdus Shakoor, resident of village P.O. and P.S. Digha near XTTI, Digha District Patna

.... Respondents

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Appearance :

For the Appellants : Mr. Abbas Haider, advocate

Mr. R. K. Singh, advocate

For the Respondents: Mr. S.A.Nasar Warsi, advocate

Mr. Raj Nandan Prasad, advocate

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

Date: 14 -03-2014

This Second Appeal under section 100 of the Code of Civil Procedure has been filed against the judgement and decree dated 07.10.1994 passed by learned 2nd Additional District Judge, Patna in Title Appeal No. 128/1991 affirming the judgement and decree passed by learned 10th Subordinate Judge, Patna in Title Suit No. 36 of 1990/ 3 of 1990.

2. The appellants herein were the plaintiffs before the court below. Partition Suit No. 36/1990 was filed by the appellants

claiming their $2/3^{\text{rd}}$ share in respect of the suit property i.e., the land with house measuring 53 decimals of plot No. 375, Khata No. 12 Tauji No. 5070 situated at village Hamidpur, Kurji in the district of Patna. As per the plaintiffs' case, one Abdul Shakur had two wives. From the first wife he had a son Nazirul Haque and a daughter Juwaida Khatoon. From the second wife he had three sons, namely, Moinuddin, Fashiuddin, Badruddin and three daughters, Kaniz Fatima, Anisul Fatima and Monisul Fatima. The said Abdul Shakur is said to have executed a registered *Tamleeknama* (Exhibit-2) on 07.11.1953 in favour of one of his sons, namely, Badruddin and two of his daughters, Kaniz Fatima and Monisul Fatima with respect to several lands including the suit land in equal shares. The donees are said to have come and remained in possession as owner of the suit property which were earlier looked after by their father. As per plaintiffs' case Abdul Shakur died in 1965 whereafter Badruddin started looking after the entire property being only male among the donees. He collected rent and distributed it among the three donees equally. As per their case, the three donees, on 16.05.1979, partitioned their lands, excluding the suit land, by registered deed of partition (Exhibit-J) and thereafter the two sisters partitioned their share allotted to them jointly in the partition of 1975 by a registered deed of partition dated 25.04.1981. As per plaintiffs' case the suit

land, i.e., plot No. 375 was left joint as it was an orchard and was being looked after by defendant No.1 (Badraddin) on behalf of all the three donees. Gradually, the trees dried up and the donees built up their house on the portion thereof and inducted tenants who had been paying rent.

3. This is to be noted that Kaniz Fatima, one of the donees, had died and her heirs, plaintiffs Nos. 2 to 9, pursue the suit.


4. The defendants/ respondents contested the suit by filing their written statement. They claimed that the *Tamleeknama* (Exhibit-2) dated 07.11.1953 allegedly executed by Abdul Shakur was forged. It was their specific case that Abdul Shakur sold portion of plot Nos. 191, 278, 295, 375 during his lifetime and remained owner of the rest of the lands till his death, which were inherited by plaintiff No.1 and mother of plaintiffs Nos. 2 to 9 and were partitioned by registered deed dated 16.05.1979. The defendants made out a case that the suit land was gifted by Abdul Shakur to defendant No.1 by *Tamleeknama* (Exhibit-B) dated 13.12.1963 and he came in possession thereafter as exclusive owner. He got his name mutated with respect to the suit land and sold a portion thereof to defendant No.2 by a registered deed dated 05.02.1990. The defendants claimed that the suit was bad for non joinder of the parties since Anisul Fatima, one of the daughters, of Abdul Shakur,

who remained in India was not impleaded as a party in the suit.

5. On the basis of respective pleadings of the parties, learned trial court framed the following issues for determination:-

- (i) *Is the suit as framed is maintainable?*
- (ii) *Have the plaintiffs got any cause of action for the suit?*
- (iii) *Is the suit barred by laws of limitation and ouster?*
- (iv) *Is the gift deed (Tamleeknama) dated 07.11.1953 alleged to have been executed by Abdul Sakur in favour of Munisul Fatima Kaniz Fatima?*
- (v) *Are the plaintiffs entitled to decree as claimed?*
- (vi) *To what relief or reliefs, if any, the plaintiffs are entitled?*

6. Learned trial court after examining the oral and documentary evidence on record decided issue No. (iv) first and held that the disputed gift deed i.e. *Tamleeknama* (Exhibit-2) dated 07.11.1953 suffered from legal infirmities and it could not be held to be a genuine and valid document. Learned trial court, on consideration of the oral and documentary evidence, disbelieved the story of the plaintiffs on the question of possession and title over the suit property referring to the partition deed dated 16.05.1979 (Exhibit-J) with respect to the suit properties left by Abdul Shakur and his successors as the description of the suit property did not find mention in Exhibit-J and on this ground learned trial court held that in the year 1979 successors of Adbul Shakur were knowing the fact that the suit plot was exclusive property of defendant No.1 and had it



been the joint family property, it would have been mentioned in Exhibit-J. Learned trial court on this reasoning held that the plaintiffs claim that the successor of Abdul Shakur were still joint at least with respect to the suit land could not be sustained. Learned trial court also held that the plaintiffs could not prove their case that the rentals which were received from the tenants residing in the suit property were divided among the plaintiffs also. Having held issue No. (iv) in favour of the defendants and against the plaintiffs, learned trial court decided issue No. (v) against the plaintiffs/appellants holding that the plaintiffs could not derive any right, title or interest in the suit property on the basis of Exhibit-2 (*Tamleeknama*). The suit, accordingly, was dismissed by the trial court.

7. An appeal was, thereafter, preferred by the plaintiffs. Learned Additional District Judge-II, Patna. Concurring with the findings of fact arrived at by learned trial court dismissed the appeal. Learned Additional District Judge, referring to the evidence on record, came to a finding that the disputed plot No. 375 had not been subject matter of gift in the year 1953. Learned first appellate court took into account the fact that no evidence, either about acceptance or delivery of possession to the donees with respect to the suit land was available and even on that account the transaction could not be

said to be complete, even it was assumed that the said *Tamleeknama* was executed on 07.11.1953.

8. The present second appeal was admitted by an order dated 17.09.1999 formulating the following three substantial questions of law:-


“(i) A definite case having been pleaded by the plaintiffs that at the time the deed of Tamleeknama (Ext.2) was executed and gift was made to the daughter and two sons of the donor, the daughter was minor, and therefore, there was no question of her accepting the gift, in absence of any pleading to the contrary by the defendants, the court below committed error of law in holding that the gift was not acted upon?”

(ii) Whether in the case of Muslim minor donee the acceptance of the father on his/ her behalf would be sufficient compliance of law?

(iii) Whether in a case where gift is made in favour of a minor it is necessary that he/ she should accept the gift on attaining majority?”

9. Learned counsel appearing on behalf of the respondents in the present appeal, at the very outset, has submitted that no substantial question of law arises in the present facts and circumstances of the case since the plaintiffs/ appellants miserably failed to prove the genuineness of the alleged *Tamleeknama* (Exhibit-2) dated 07.11.1953 which was the foundation of their case. According to him, substantial questions of law have been framed by this court under a presumption that there was valid deed of *Tamleeknama* executed by Abdul Shakur.

10. As has been noted above, as per appellants own case, the *Tamleeknama* (Exhibit-2) was executed on 07.11.1953 in



favour of defendant No.1, Badruddin and plaintiff No.1, Monisul Fatima and mother of plaintiff Nos. 2 to 9, namely, Kaniz Fatima which was registered on 09.11.1953. As per their own case, even after the said execution of *Tamleeknama*, Abdul Shakur remained in possession over the suit property. The fact that the plaintiffs did not come in possession over the suit property after alleged execution of *Tamleeknama* (Exhibit-2) dated 07.11.1953 is not in dispute. It is also the case of the plaintiffs that defendant No.1 was realizing rent from tenants residing in the building over the suit property but according to them the rent was collected and was equally distributed among the three. From the judgement of learned trial court it would appear that the parties (except purchaser defendant) are the successors of Abdul Shakur and save and except Anisul Fatima other successors of Abdul Shakur migrated to Pakistan and had, accordingly been, debarred from taking share in their ancestral property.

11. Learned trial court took into account the fact, dealing with Exhibit-H series that some of the properties covering the alleged deed of gift (Exhibit-2) were sold to some other persons and also a portion of disputed plot had been sold by him to defendant No.2, apparently in possession of the same. It would further appear from Exhibit-H series that Abdul Shakur was

continuing in possession over the land detailed in Exhibit-2 till 1965.

Learned trial court refused to accept the plea raised on behalf of the plaintiffs that Abdul Shakur was looking after the affairs of the properties mentioned in Exhibit-2 even after execution of *Tamleeknama* as the contents of the sale deed (Exhibit-H series) did not mention any such thing. From Exhibit-H series, it was evident that he sold the property in the capacity of full owner of the properties and received the consideration money. There is nothing on record to show that Abdul Shakur in his capacity as manager of the donees transferred the properties and after receiving consideration money handed it over to the donees according to their respective shares.

12. Learned counsel appearing on behalf of the appellants vehemently submitted that on the date of execution of *Tamleeknama* the donees were minors and, therefore, actual delivery of possession to them was not required. According to him, as a matter of fact, the donor himself accepted the gift on behalf of the donees being their father and genuineness of *Tamleeknama* dated 07.11.1953 could not have been questioned on that ground. It has been contended, referring to Section 155 of **Mulla Principles of Mahomedan Law** that no transfer of possession is required in the case of gift by a father to his minor child or by a guardian to his

ward and all that is necessary is to establish is a bonafide intention to give.

13. As has been noted above, it has been submitted on behalf of the respondents that the present second appeal does not involve any substantial question of law in view of concurrent findings of fact by the two courts below on the validity of *Tamleeknama*. It has been submitted that the story of execution of *Tamleeknama* is falsified by unimpeachable documents (Exhibit-H series) which show that Abdul Shakur had sold properties to other persons which included the property mentioned in the *Tamleeknama*. It has been further contended that Section 155 of the **Mulla Principles of Mahomedan Law** will not apply in the facts and circumstances of the present case as admittedly on the date of alleged execution of *Tamleeknama* (Exhibit-2) dated 07.11.1953 Kaniz Fatima was major. He has relied upon a judgement of **Karnataka High Court** reported in **AIR 1998 Karnataka 39 (Abdur Rahman v. Athifa Begum)** to contend that there are three essentials of gift under Muslim law:-

- (i) *declaration of the gift by the donor*
- (ii) *acceptance of the gift so made by donee and*
- (iii) *delivery of the possession or the usufruct of the subject property so gifted.*

14. In the background of the facts, as noted above, and

the submissions made on behalf of the rival parties, I would deal with substantial questions of law framed by this court vide order dated 17.09.1999.

15. Section 155 of **Mulla Principles of Mahomedan**

Law reads thus:-

“Gift to a minor by father or other guardian.- No transfer of possession is required in the case of a gift by a father to his minor child or by a guardian to his ward. All that is necessary is to establish a bonafide intention to give.”

16. It is true, in terms of Section 155 of Mulla Principles of Mahomedan Law, that no transfer of possession is required in case of a gift by a father to his minor child but this is not the case of the appellants/ plaintiffs that all the children in whose favour the said *Tamleeknama* (Exhibit-2) dated 07.11.1953 was executed were minor on the date of execution. It is specific case of the defendants that one of the donees, Kaniz Fatima (mother of plaintiffs Nos. 2 to 9) was major on the date of the alleged deed of gift. It is true that in case of a Muslim minor donee, the acceptance of the father of his/her behalf is sufficient compliance of law but in the present case Kaniz Fatima, one of the donees, admittedly being major on the date of execution of *Tamleeknama*, acceptance of gift deed and transfer of possession was mandatory for the *Tamleeknama*

to become operative. So far substantial question of law No. (iii) is concerned, I am of the view that there is concurrent findings of fact by the courts below that the said *Tamleeknama* dated 07.11.1953 was invalid and inoperative not only because of absence of acceptance and transfer of possession but also because several evidences available on record went to show that no such deed was executed. There is concurrent finding by the courts' below that existence of sale deeds executed by Abdul Shakur with respect to the properties included in the *Tamleeknama* (Exhibit-2) dated 07.11.1953 could not be proved and execution of another *Tamleeknama* in favour of Badruddin in the year 1963 negated the plaintiffs' case of execution of deed of *Tamleeknama* dated 07.11.1953.

17. I, accordingly, find no merit in the present second appeal and the same is accordingly dismissed.

In the facts and circumstances of the case, there shall be no order as to costs.

(Chakradhari Sharan Singh, J)

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